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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 187

ELIZABETH ANN DUNCAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S CLOSING BRIEF

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I.

Petitioner's Right to a Fair Trial as Guaranteed by the Due Process Clause of the XIV Amendment Was Denied by the Manner in Which the Constituency of the Jury Was Established.

In petitioner's opening brief, supplemented by argument herein, among other things, she demonstrates and argues in substance as follows:

1. Jurors Porter, Behrens, Saavedra and Flynn entered the box with opinions that petitioner was guilty.

2. On initial examination by petitioner's attorney, such opinions were reiterated; and these jurors indicated their inability to judge impartially.

3. On examination by the District Attorney, slight vacillations were secured by a technique described in petitioner's opening brief.

4. At the conclusion of their "examination" by the District Attorney, the slight vacillations ceased, and the pendulum came to a rest pointing in the same direction that it pointed when the vacillations commenced.

5. With respect to these four jurors, the State action was not within the framework of the California Statutes or procedure, and these jurors could not be "rehabilitated".

6. Regardless of that, such action was not within the purview of the federal criteria, and for that reason, these jurors could not be "rehabilitated".

7. Petitioner was required to utilize four of her peremptory challenges to rid the box of those jurors, who should have been excused for cause.

8. In effect, the trial court reduced the number of peremptory challenges granted by statute, and denied petitioner the equal protection of the laws.

9. Thereafter, jurors Hall, Berch and Horrell entered the box with biased opinions.

10. Historically, jurors entering the box with an opinion as to defendant's guilt were *ipso facto* disqualified; and no "rehabilitation" was permitted.

11. Even if these three jurors were in the area permitting their "rehabilitation", contemplating their *voir dire* examination in its entirety, their "rehabilitation" was illusory.

12. Regardless of whether or not such "rehabilitation" was illusory, or whether or not Jurors Hall, Berch and Horrell were in the area permitting their "rehabilitation", the presence of these jurors in the box was obnoxious to petitioner, and she was frustrated from ridding the box of these jurors because she was improperly deprived of four peremptory challenges by the trial court in its treatment of prospective jurors Porter, Behrens, Saavedra and Flynn.

13. Historically, this Court has supervised the findings as to the qualifications of jurors as it affects due process.

14. Historically, this Court has held to a minimum any "departure" from the rule that a juror entering the box with an opinion was *ipso facto* disqualified.

15. Herein, the departure was more than minimal, and the approval of a jury of the type described in a capital case would be an anomaly in Anglo-Saxon jurisprudence.

A. The Question as to the Bias of the Three Jurors Was Raised Below and Properly Is Before This Court.

In urging the negative of the above statement, respondent states as follows (Resp. Br. p. 28):

> "Now, for the first time petitioner wishes to challenge these jurors for bias on the basis of the answers which were made on voir dire. The issue was not even presented to the Supreme Court of California, for there the only questions as to the qualifications of prospective

jurors were in regard to four individuals who in fact did not hear the case . . . "

Respondent is in abject error.

Beginning on page 15 and ending on page 19 of her reply brief filed in the California Supreme Court, petitioner delineated the *voir dire* examination of Jurors Hall, Berch and Horrell, the utilization of petitioner's last peremptory challenge to excuse Juror York, her inability to deal with the three prejudiced jurors in question, and her dissatisfaction with these three jurors.

Consequently, much of respondent's argument under this point is irrelevant.

Respondent argues further in substance that petitioner's counsel was obviously satisfied with the jury because he failed to challenge the three disputed jurors; and that an objection to jurors must be made *in limine*.

In effect, respondent urges that in order to protect the record petitioner should have ritualistically challenged the jurors for cause.

Petitioner systematically challenged for cause those jurors who had entered the box with an adverse opinion, and who purportedly had been "rehabilitated" by the district attorney under Section 1076 of the California Penal Code.

The trial court systematically overruled such challenges for cause.

Jurors Hall, Berch and Horrell, with minor variations, had reiterated the answers furnished by the prior jurors whom petitioner had vainly challenged for cause.

Respondent would require petitioner, in the presence of these jurors, to make the accusation that they were preju-

diced and unfit to serve; and to make such accusation without the power to excuse these jurors peremptorily in the event of an adverse ruling, petitioner's peremptory challenges having already been exhausted.

No attorney worth his salt would subject his client to the risk of alienating jurors who already had expressed an opinion adverse to his client; and no court would require an attorney to so do.

One may infer that respondent concedes that challenges for cause to jurors Hall, Berch and Horrell would have been futile; or, at least, one may infer that respondent's denial of such futility is made with tongue in cheek.

Respondent then states that such futility has no basis in fact because the trial judge "did uphold numerous challenges for cause made by petitioner's attorney."

To justify this statement respondent lists the names of 18 prospective jurors dismissed upon petitioner's challenges.

Analysis of the record shows that with respect to a great number of these 18 prospective jurors excused by the trial court after they were challenged for cause, not even token compliance with the "rehabilitation" statute was effectuated. Additionally, of these 18 excuses one (Boynton), was excused, not for cause, but because he had to smudge oranges (Tr. of R. p. 227) and only one of the remaining 17 (Campbell Tr. of R. p. 194) was excused over the objection of respondent.

In not one of these 18 challenges for cause upheld by the trial court is there any rational basis for anticipation that the trial court would sustain a challenge to any of the three disputed jurors.

Calling from the list of 18, respondent then sets forth as a classic example, the *voir dire* examination of prospective juror Dodds. The respondent states as follows:

> "The Court's ruling as to prospective juror Dodds is of particular interest. The latter admitted on voir dire that she had formed an opinion of the merits of the case prior to trial. . . . However, she went on to testify that she could set aside her opinion and render a verdict solely on the evidence to be presented and in accordance with instructions from the Court . . . Nevertheless, the Court upheld a challenge for cause by defense counsel. . . . It is important to note that this occurred *after* the denial of the challenge for cause to prospective jurors Porter, Saavedra, Flynn and Behrens but *prior* to the examination of jurors Hall, Berch and Horrell. In view of this, it can hardly be claimed that challenges to the latter three would necessarily have been in vain. . . . "

Respondent's epitome is incomplete and misleading. Actually, the record indicates that with respect to prospective juror Dodds, there is less basis for anticipation that the trial court would sustain a challenge to any of the three disputed jurors than existed with respect to the other 17 prospective jurors.

During her examination prospective juror Dodds stated that she believed the defendant to be guilty, and that she would require evidence to remove that opinion. The examination *concluded* as follows (R. 627):

> The Court: You don't mean to say that you would require the defendant to prove anything, do you? The defendant is not required to prove anything under the law.

The Prospective Juror: I realize that, Judge Blackstock, yes.

The Court: But you said ago (sic) that you would need some testimony from the defendant.

Mr. Gustafson: Your Honor, the question she answered was that she would need some evidence to remove her opinion.

The Prospective Juror: Opinion.

The Court: But she indicated at one time that she would require some evidence from the defendant to remove that opinion. Didn't you (sic)?

The Prospective Juror: That's right, I said that.

The Court: You did that, didn't you?

The Prospective Juror: I said that.

The Court: You still feel that way?

The Prospective Juror: Yes, sir.

Consequently, it appears that at the conclusion of the *voir dire* examination of prospective juror Dodds, she maintained a stubborn prejudice against petitioner that inhibited her from accepting any hypothesis which included a presumption of petitioner's innocence; and that her adamance was such that she unalterably placed upon petitioner the burden to produce testimony overcoming the presumption of guilt.

Prospective juror Dodds' incompetency to serve is apparent even to those afflicted with legal myopia.

Immediately upon the termination of the *voir dire* examination of prospective juror Dodds, the trial court then stated as follows:

The Court: This is the last challenge. If he had to use a challenge on this juror, it would be his last challenge. I think I will allow this challenge.

It is observed that the trial court disqualified prospective juror Dodds not because of her abject inability to accord petitioner the presumption of innocence, and her unalterable position in requiring petitioner to produce evidence to prove her innocence, but disqualified her only because "it would be his last challenge" ("his" referring to petitioner's attorney).

The spontaneous articulation by the trial court may have revealed subconscious expiation for the prior rulings on challenges for cause interposed by petitioner.

B. The Jurors Who Actually Tried the Case Were Partial and Biased.

In urging the negative of the above statement, the respondent states as follows (Resp. Br. p. 38):

> "Petitioner does not attack the validity of the California statute. This is understandable in light of the cases which have consistently held that such statutes are constitutional. *Ex parte Spies*, 123 U.S. 131 . . . (upholding the validity of a similar Illinois statute); *Hopt* v. *Utah*, 120 U.S. 430 . . . (upholding a similar statute of the Territory of Utah); *Irvin* v. *Dowd*, supra, (upholding the validity of a similar Indiana statute); . . . *Holt* v. *United States*, 218 U. S. 245 . . . ".

Although the above statement is immaterial in view of petitioner's position, nevertheless, petitioner is impelled to expose the inaccuracy of such statement.

In *Hopt, supra*, no argument was offered with respect to the constitutionality of the Utah statute, and not one line of the Court's opinion is devoted to that issue. Apparently, respondent's attorney did not read the opinion before presenting it to this court for consideration.

In *Holt, supra,* no argument was offered with respect to the constitutionality of the statute involved, and not one line of the Court's opinion is devoted to that issue. Apparently, respondent's attorney did not read this opinion either, before presenting it to this Court for consideration.

Irvin, supra, apparently is before this Court and has not been decided.

In *Spies, supra,* the opinion consists of 16 lines. The only issue discussed was a matter of procedure, to wit, the propriety of moving in open Court for a writ of error. Apparently respondent's attorney intended to cite another *Ex parte Spies,* following *Spies, supra.* In that case, appellants urged the invalidity of the Illinois "rehabilitation" statute. No serious constitutional argument is delineated either for or against its validity. As far as petitioner's attorney can comprehend, after several readings, the Court took the position that:

1. The Illinois statute was similar to other statutes.

2. On a prior occasion with respect to a similar statute another appellant did not suggest a doubt of its invalidity.

3. Several state courts have upheld the validity of their own statutes.

Then the Court stated as follows:

> "Without pursuing this subject further, it is sufficient to say that we agree entirely with the Supreme Court of Illinois in its opinion in this case that the statute on its face, as construed by the trial court, is not repugnant to section 9 of Article 2 of the constitution of that state . . . "

Spies, supra, was decided in 1887.

C. The Denial of the Challenges for Cause of Four Prospective Jurors Who Were Later Removed Gives Rise to a Constitutional Question.

Jurors Porter, Behrens, Saavedra and Flynn were clearly subject to challenge for cause. They had entered the box with opinions of guilt; maintained their opinions during examination by the District Attorney (with the exception of a few vacillations produced by the District Attorney's technique) and indicated their unwillingness to be judged by jurors in their frame of mind.

"Rehabilitation" of these prospective jurors was not within the jurisdiction of the trial court, either under the criteria in the federal jurisdiction, or under Section 1076 of the California Penal Code, because their opinions were either in part or entirely based upon information obtained from specific persons, and not exclusively from general circulating reading material or common rumor.

Under Section 1070 of the California Penal Code, petitioner and respondent were entitled to 20 peremptory challenges.

By improperly overruling four of petitioner's challenges for cause and requiring her to utilize four of her peremptory challenges to rid the jury box of four prejudiced jurors, the California courts limited the petitioner to 16 peremptory challenges in derogation of the number granted to her by the California Legislature. Under this hypothesis, petitioner was denied the equal protection of the laws.

If the California Legislature had established a disproportionate number of peremptory challenges in favor of the prosecution, it would have invited attack upon the validity of such legislation on the ground of denial of due process.

Court action effectuating the same objective is no less amenable to the same kind of attack.

Jurors Hall, Berch and Horrell entered the box with an opinion as to petitioner's guilt. In the absence of a "rehabilitation" statute they were *ipso facto* disqualified. *Arguendo,* if these jurors were in the area permitting "rehabilitation", nevertheless, prejudice occurred when petitioner was unable to challenge peremptorily these jurors because of the improper deprivation of the four peremptory challenges.

A prospective juror may declare his willingness and ability to lay aside his admitted prejudice, and to decide issues fairly in accordance with the instructions of the trial court. The juror may make this declaration with great sincerity. Nevertheless, subtle psychological factors, unrecognized by the declarant, may render the declaration illusory. Ostensibly in the limbo, nevertheless, such prejudice still may exist. As a protection from the impact of such prejudice a litigant is afforded the right of peremptory challenge, to be exercised by him as he sees fit, without harassment by the Court. This right is a substantial one and is part of due process.

In *Hayes* v. *State of Missouri,* 120 U.S. 68, 7 S. Ct. 350, this Court stated as follows:

> "The Constitution . . . guarantees to all persons accused . . . the right to a trial by an impartial jury . . . and this implies that the jurors shall be free from all bias for or against the accused . . . Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet

find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection . . . "

Depriving petitioner of the right to peremptorily challenge juror Hall was especially poignant. Her father and sister were police officers in California. Her dear friend, a sorority sister, had been murdered shortly before petitioner's trial. She had read the District Attorney's prejudicial press releases which helped formulate her opinion that petitioner was guilty. With respect to prejudice juror Hall was more than suspect. To expect her to completely be devoid of subconscious feelings against petitioner would impute to her unhuman qualities.

In *State* v. *Joiner*, 112 So. 503, 163 La. 609, a juror had discussed the facts of an impending criminal trial with a close friend of his. The close friend became a prosecution witness. During the *voir dire* examination the juror frankly admitted his prior discussion, but averred his willingness and ability to try the case fairly and impartially. Upon this declaration the trial court permitted the juror to serve. The appellate court reversed a conviction, and with respect to the purported rehabilitation of the juror stated as follows:

" . . . he testified, under questioning of the district attorney and the . . . judge, that he could disregard all personal views . . . and give the defendant a fair and impartial trial.

"These declarations of the juror, however, must be tested, like all other human testimony, according to the common knowledge, experience and observation of mankind.

"It is the natural impulse of all men, with rare exceptions, when the direct question is put to them, es-

pecially by one in authority, such as a district attorney or a trial judge, to declare that they believe they can disregard a preconceived opinion and render a fair and impartial verdict . . . In general, they are sincere . . . The declaration, however, should not only proceed from the venireman, but it should be made in connection with a state of facts showing that it is probably true.

"The belief which the juror expressed, upon his examination by the District Attorney and the Court, that he could render an impartial verdict . . . does not alter the situation. One may believe an untruth of himself as well as of another. A person governed by prejudice is usually unaware of its existence . . . "

In *Joiner, supra*, the juror was less suspect than Juror Hall herein.

In *Wright* v. *Bernstein*, 129 Atl. Rep. 2d 19, the New Jersey Appellate Court stated as follows:

"The fundamental right of a trial by a fair and impartial jury is jealously guarded by the courts. The jury is an integral part of the court for the administration of justice . . . "

" . . . *The denial of the right of peremptory challenge is the denial of a substantial right* . . . it is prejudicial per se and harmful, and a party is not required to make an affirmative showing that the denial of his right to peremptory challenge had resulted in prejudice . . . " (emphasis furnished).

Conclusion

Juror Hall entered the box with an opinion as to petitioner's guilt. Her father and sister were police officers in California. Shortly before petitioner's trial, her dear friend, a sorority sister, was murdered. She had read the District Attorney's prejudicial press releases, which helped shape her opinion that petitioner was guilty.

Juror Horrell's father had been a deputy sheriff of Ventura County. He also had read the prejudicial newspaper articles relating to the Grand Jury testimony, and that he believed petitioner to be guilty.

Juror Berch entered the box with an opinion that petitioner was guilty and maintained that opinion.

These jurors were *ipso facto* disqualified from sitting in a capital case.

And if they were not *ipso facto* disqualified, considering the psychological factors, particularly with respect to Juror Hall, the finding of the trial court that these jurors would and could act impartially despite their admitted prejudice constituted an abuse of discretion.

And if the finding of the trial court did not constitute an abuse of discretion, the presence of these jurors was obnoxious to petitioner, and petitioner should have had available the peremptory right to challenge them.

Petitioner was deprived of such right in a manner violating her right to the equal protection of the laws. This resulted in a denial of due process.

Respectfully submitted,

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